
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

Date Issued: Jan 28, 1992
Case Number: 90-ERA-43

In the Matter of:

ROBERT P. STOCKDILL,
Complainant,

v.

CATALYTIC INDUSTRIAL MAINTENANCE
COMPANY, INC.,
Respondent

Robert P. Stockdill
Pro se

Gary J. Walter
For the Respondent

BEFORE: JAMES GUILL
Associate Chief Judge

RECOMMENDED DECISION AND ORDER

I. INTRODUCTION

This proceeding involves a claim seeking redress in accordance with the provisions of Title 42 U.S.C. §5851, which prohibits an employer from discharging or otherwise discriminating against an employee who has engaged in activity protected

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under the statute. The regulations, at 29 C.F.R. Part 24 and 29 C.F.R. Part 18, govern hearings and the disposition of cases under the Energy Reorganization Act of 1974.

A. Regulatory Scheme

The Energy Reorganization Act of 1974 (as amended) revised its predecessor, the Atomic Energy Act of 1954, by establishing two agencies for licensing and regulatory purposes. The Energy Research and Development Administration (ERDA) assumed the duties of energy program research and development and nuclear weapon facility responsibilities. The Nuclear Regulatory Commission (NRC) assumed the responsibility for nuclear power plant licensing. In 1977, the Department of Energy (DOE) assumed responsibility for nuclear weapon facilities and other duties. *See, Wensil v. B. F. Shaw Co.*, 87-ERA-12 (Decision and Order of the Secretary of Labor, Mar. 29, 1990. Complainant, Robert P. Stockdill, filed a complaint with the Wage and Hour Division of the Department of Labor on April 13, 1990, protesting his termination by Respondent on March 25, 1990 (Tr. 16, 17).

B. Procedural Background

The Department of Labor initially investigated this complaint and determined that complainant's termination did not constitute an action proscribed by the Act (Tr. 126-27, 16). Thereafter, Complainant timely appealed that determination to this Office by a telegram dated May 22, 1990 (Tr. 17). Formal hearings were held in Atlanta, Georgia, on June 25-26, 1990, wherein the parties were afforded the opportunity to present evidence and argument. After an enlargement of time to file briefs, a post-hearing brief was submitted on September 13, 1990 by Respondent. Complainant, not represented by counsel (Tr. 5), submitted his post-hearing statement on August 10, 1990.[1]

II. OVERVIEW

This claim concerns Complainant's grievance that he was unjustly fired from his employment as a boilermaker for his refusal to work in the condenser bay area of a power plant. complainant alleges that this termination was in and of itself discriminatory, and that it was based on his prior reports of unsafe working conditions. Respondent argues that there was no

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discriminatory basis for Complainant's termination, as it was based solely on Complainant's unreasonable refusal to report to a safe worksite.

III. STATEMENT OF FACTS

The compilation of evidence and testimony is specifically set forth in numbered paragraphs and is contained in the appendix hereto. These fact are later cited in the

factual discussion as appropriate.[2] Administrative documents, labelled ALJ-1 to ALJ-13, were also admitted at the hearing (Tr. 408-11, 415). ALJ-14 was admitted after the hearing, pursuant to a discussion held during the hearing. Complainant waived the time constraints imposed by 29 C.F.R. Part 24 (ALJ-5, 6, 8).

IV. DISCUSSION AND CONCLUSIONS

A. Applicable Principles of Law

The Act's employee protection provision (§210 of the Energy Reorganization Act), in pertinent part, provides:

> (a) No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . --
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended . . . or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
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> (2) testified or is about to testify in any such proceeding or;
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> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any

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> other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended ....
> (b)(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor . . . alleging such discharge or discrimination. . . .

42 U.S.C. §5851.

To establish the jurisdiction of the Department of Labor over this Act's whistleblower cases, the Secretary of Labor has held that Congress included only those employers who are engaged in activities at a site regulated to some extent by the Nuclear Regulatory Commission. *Wensil, supra* (holding that the Energy Reorganization Act whistleblower provision does not cover activities at a nuclear weapons facility regulated by the Department of Energy).

The burdens of proof in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), were adopted by the Secretary of Labor for whistleblower cases in *Dartey v. Zack Company of Chicago*, 82-ERA-2 (Decision and Order of the Secretary of Labor, April 25, 1983). Further, to come under the whistleblower provisions of the Energy Reorganization Act, it must be shown that the respondent is an employer under the Act and that the complainant is an employee under the Act.

For a claim of discrimination or disparate treatment to succeed, a complainant must establish a *prima facie* case, including:

1. That the complainant engaged in protected activity;

2. That the respondent knew or had knowledge of the protected activity;

3. That the complainant was discharged or otherwise discriminated against with respect to his compensation, terms, conditions or privileges of employment (stated differently, that the respondent took adverse action against the complainant).

Dartey, supra; Atchinson v. Tompkins-Beckwith, Inc., 82-ERA-12 (Decision and Order of the Secretary of Labor, Jan. 28, 1988). The evidence presented by Complainant must be sufficient to "raise the inference that . . . protected activity was the likely reason for the adverse action." *Dartey, supra* at 8 (citing *Cohen v. Fred Mayer, Inc.*, 686 F.2d 793 (9th Cir. 1982).

If the prima facie case is shown, the respondent then must provide evidence indicating a nondiscriminatory reason for the adverse action. *Burdine, supra; Hamm v. Members of Bd of Regents of State of Fla*., 708 F.2d 647 (11th Cir. 1983). The ultimate burden remains on the complainant to show the causal relationship between the protected activity and the adverse action. *Dartey, supra* at 8. Proof concerning the causal relationship may show: (1) that there was no causal relationship, in whole or in part, between the alleged protected activity and the adverse employment action; (2) that the proffered reason was not the real reason for the employment decision, and that more likely than not the protected activity motivated the respondent; and (3) that the respondent was motivated by both the protected activity and legitimate reasons (resulting in the "dual motive" analysis detailed in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)). *Dartey, supra*, at 8-9.

In the following discussion and conclusions, reference to evidence and factual findings is made to the numbered findings of fact included in the appendix (hereinafter designated as "F" with a corresponding fact number). Such facts are considered findings of fact for purposes of this recommended decision and order. As appropriate, references are also made to exhibits and transcript pages.

B. Jurisdiction

At the hearing, information was sought concerning the jurisdiction of the Department of Labor over this complaint (Tr. 13). I find that the Department of Labor does have jurisdiction over this proceeding, as the authority of the Nuclear Regulatory Commission over this facility has been established (Tr. 19, ALJ- 14). *See, Wensil, supra*.

Additionally, the parties did not contest the issues of whether Respondent is an employer under the Act and whether Complainant is a covered employee under the Act (Tr. 10-11, F-5,

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Respondent's post-hearing brief).

C. Prima Facie Case

The burden lies on Complainant to first prove his *prima facie* case. *Dartey, supra; Atchinson, supra*. Complainant alleges two different sets of protected activity: first, that his refusal to work was a protected activity in and of itself; and second, that he was treated differently upon his refusal to work because of previous safety complaints.

1. Refusal to Work

The Secretary of Labor has held that a refusal to work, under appropriate circumstances, is in and of itself a protected activity as an internal complaint.[3] *Pensyl v. Catalytic, Inc.*, 83-ERA-2 (Decision and Order of the Secretary of Labor, Jan. 13, 1984). Therein, the Secretary explained the two-part determination necessary for a refusal to work to be considered protected activity. The first determination involves the following:

> A worker has a right to refuse to work when he has a good faith reasonable belief that working conditions are unsafe or unhealthful. Whether the belief is reasonable depends on the knowledge available to a reasonable man in the circumstances with the employee's training and experience.

Pensyl, supra, at 6-7. The unsafe or unhealthful conditions, if a complainant's beliefs were reasonable, should then be investigated by the appropriate officials.

The second factor to consider in determining whether the refusal to work is a protected activity is as follows:

> Refusal to work loses its protection after the perceived hazard has been investigated by responsible management officials and government inspectors, if appropriate, and, if found safe, adequately explained to the employee.

Pensyl, supra, at 7.

The present case involves Complainant's refusal to work when

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he was denied mask protection for the condenser bay area. Respondent CIMCO contracted with Georgia Power Company to perform a retubing of the condenser bay at Plant Edwin I. Hatch (Tr. 11- 14). Complainant alleges, and I find his testimony credible, that he believed he had seen unspecified dust in the work area on March 24, 1990 (F-70). Complainant's work area in the nuclear power plant was the condenser bay, below the turbine in the turbine building (Tr. 113, F-11). In the condenser bay, Complainant and other boilermakers were pulling tubes from the condenser for replacement purposes (F-14, F-15). Boilermakers pulled out the old tubes and replaced them with other tubes (F-15). There was a process for wetting the tubes before pulling, as tubes pulled dry could exhaust contaminated dust or particles (F-36, F-37). Water pumps, replacing the water boxes, were used to wet the tubes (F-36). Stainless steel tubes could also give off contaminated dust or particles (F-51, F-52, F-133, F-134). However, I find that Complainant did not pull stainless steel tubes (F-135).

The condenser bay area was divided by its four water boxes, which served as separate work areas for the boilermakers (F-13). Complainant worked in box "A," which was in a portion of the work area with box "D," where the more contaminated tubes were being pulled (F-26). There was also plastic draping around the work boxes, to prevent the spread of contaminated water or particles to an extent (F-30, F-85, F-102). Complainant did not feel that the draping was adequate protection from possible contamination (F-81, F-83, F-85). Complainant alleged that he had seen tubes pulled out dry before, and that he had heard that tubes were pulled out dry on the night shift of March 24, 1990 (F-70, F-75). None of Respondent's witnesses recalled tubes being pulled out dry. Complainant alleged that he had heard that workers on the night shift had worn dust masks or respirators, and that a few workers were transferred to other work areas (F-75).[4] I find Complainant's statements credible that he had heard the previous night shift wore protection, and that this basis was sufficient to question management as to whether he could wear some sort of protection.

Complainant also feared that the dust could have come from pulling operations at "D" box, where the more contaminated tubes were being pulled (F-83, F-85). While Complainant stated that it was speculation on his part that there was dust in the work area

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on March 25, 1990 (F-72), I find it reasonable that he had concerns after he thought he saw dust on March 24, 1990 and after hearing about the previous night shift.

The work, performed in a radiologically controlled area, was performed pursuant to a Radiation Work Permit (RWP) which outlines possible radiological conditions and the respective protective devices and clothing (F-50). Boilermakers wore plastics and a face shield as their basic protection while pulling tubes (F-39, F-41, F-43). Due to the amount of radiation exposure (not contamination), workers were rotated to reduce the overall accumulated exposure (F-21). When an air sample required, or when the workers were pulling stainless steel tubes, the boilermakers were required to wear respirators (F-49, F-51, F-52, F-132, F-133). According to Respondent's witnesses, dust masks were prohibited by company rule and by federal regulations in this work area (F-115, F-127, F-128, F-199, F-200). Neither party adequately explained, however, why there was a box of dust masks near the entrance to the condenser bay work area, and therefore Complainant's allegations concerning this matter are inconclusive. I find, however, Respondent's witnesses' statements to be conclusive on the issue of whether dust masks were prohibited inside the condenser bay area. Further, Complainant has not provided any probative or reliable evidence that dust masks were not prohibited or that they were worn. He did offer unsupported allegations that he had heard some workers had worn dust masks. As such, this evidence can be given very little weight in light of its weakened credibility and probative value (see Tr. 26 and F-75). While Mr. Jankovich, a health physics technician (HP) and a witness for Complainant (F-9), testified that he had heard that some workers on the night shift wore dust masks, this does not prove that such masks were not prohibited (F-176).

This prohibition against wearing dust masks initiated the problems Complainant encountered on March 25, 1990. After he requested a respirator before going into the work area, Complainant's request was denied for lack of his qualification to wear such an instrument (F-70). Respirators were only allowed when such a need was determined, as the respirators placed additional strain on workers (F-53, Tr. 220). Complainant had previously requested a mask on March 24. This request was also denied (F-70). On March 25, 1990, after Complainant requested a mask, a technician gave him a dust mask (and a spare) to wear in

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the work area (F-71). However, an HP near the entrance to the condenser bay refused to let Complainant go into the work area wearing the dust mask, because of the prohibition of dust masks in that work area (F-73). The HP brought Complainant to Mr. Purvis, the HP foreman (F-8), who told Complainant to wait until he could determine whether Complainant could wear the mask (F- 112).

Due to Complainant's belief that the work area was unsafe, he refused to work in that area without the dust mask or a respirator (F-81.). Mr. Purvis then called his control point to see if there had been problems with contaminated particles or dust (F-116). Mr. Purvis had reviewed air sample test results for the previous night shift and those performed on the morning of March 25, 1990 (F-116). The air sample test results indicated that respiratory protection was not required, according to his testimony (F-116). Workers did

wear respirators during the previous night shift, however, due to the fact that they were pulling stainless steel tubes (F-135). They should not have worn dust masks, according to Respondents' uncontradicted evidence (F- 135). Based upon Mr. Purvis' explanation of the test results submitted into evidence, I find his analysis of the air samples to be sufficient (F-118, F-119). Mr. Purvis told Complainant that the work area was safe from radioactive airborne particles, and explained the test results (F-120). HPs frequently monitored the condenser bay area with both "lo-vol" and "grab" air samples (F-140, F-129). HPs also monitored the work area by constant inspection (F-55). Complainant did not ask to see the test results, although at the hearing he stated that that was the reason why he felt the Respondent's explanation of the work area's safety was insufficient (F-122, F-82). Mr. Purvis testified that Complainant appeared satisfied with the explanation, and did not mention the possibility of radioactive dust again (F-120, F-123). At that point in time, Complainant also mentioned a breathing problem he had which was irritated by dust in general (F-123). Mr. Purvis explained the problems with wearing a dust mask, and Complainant was referred to Mr. Thurmond, a safety engineer and asbestos supervisor for Respondent (F-10), to address the issue of particles other than contaminated dust (F-123, F-124, F-125, F-130, F-179).

Mr. Thurmond called Mr. South, his supervisor and the superintendent for Respondent (F-6), concerning Complainant's refusal to work (F-142). Mr. South instructed Mr. Thurmond to

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check out the work area, and Mr. South himself went to two locations to inspect the area (F-142, F-143). As Mr. South did not go into the actual work area, but visually inspected the area from other points somewhat remote, his belief that the area was free from dust, standing alone, would be questionable (F-142, F- 143, F-144, F-145, F-146). However, as Mr. Thurmond checked air samples for dust particles and specifically for asbestos dust, and performed a more adequate visual inspection, Respondent's investigation and explanation of the work area's safety is found to have been appropriate and sufficient (F-180, F-181, F-182, F- 183). Mr. Thurmond checked asbestos log entries, from test results monitored by an independent laboratory, and found no adverse conditions with the test results (F-181, F-182, F-183). Mr. Thurmond also testified that there were no asbestos removal operations in the vicinity of Complainant's work area which could have produced dust (F-181). Finally, Mr. Thurmond dressed in the appropriate protective gear and visually inspected the work area (F-181). He also checked with the HP's office and was told there was not a dust problem (F-181). Mr. Thurmond testified that there was no visual haze from dust particles, as would be common if there was a dust problem (F-181). Furthermore, there were no other operations which would have created a dust hazard (F-181, F-183). Mr. Thurmond explained to Complainant that there was no dust in the work area based upon his visual inspection, and that there was no asbestos dust reported in test results (F-180, F- 181, F-182).[5]

Although Complainant alleged that Mr. Thurmond and Mr. South told him the dust might have been "nuisance dust," I do not conflicts with the weight of the evidence which indicates that Mr. Thurmond and Mr. South told Complainant there was not a dust problem in his work area (F-180, F-182, F-148). Mr. Thurmond inspected the work area on a very frequent basis, and was very qualified to perform the duties of checking for dust particles (F-10, F-192, F-193). Mr. Jankovich did not work during Complainant's shift on March 25, 1990 (F-161), and Complainant himself does not have the training or experience in asbestos as compared to Mr. Thurmond (F-10). Thus, I find Mr. Thurmond's determinations concerning the safety of the work area to be more persuasive.[6]

Thereafter, Mr. Thurmond informed Mr. South of his findings, and Mr. South directed Complainant's foreman to have Complainant return to work (F-148). Complainant was aware that he would be

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terminated for refusing to report to a work assignment (F-91, F- 148). Complainant, however, again refused to work without a dust mask (F-148). Thereafter, Mr. South instructed Complainant's union steward to process Complainant's termination (F-148). Mr. South said there was no reason to reassign Complainant to another work area or send him home for the day (F-148). According to Respondent's rules, immediate discharge (with qualified eligibility for rehire) follows unjustified refusals to work (Rx- 18).[7] Complainant was terminated at approximately 10 a.m. on the morning of March 25, 1990 (F-149).

Based on the foregoing, I find that Complainant's initial refusal to work was based on a reasonable and good faith belief that the work area was unsafe. Complainant had seen dust on the previous day's shift, and had heard that workers on the previous night shift wore respirators or dust masks or were assigned to different work areas. Reinforcing these concerns, Complainant had some doubts as to whether the HPs were properly performing their duties, and Complainant had doubts and fears as to whether the plastic draping between work boxes would stop contamination. Therefore, Complainant satisfies the first prong of inquiry into whether his refusal to work was a protected activity.

I find, however, that the appropriate officials investigated the perceived danger and adequately explained the results to Complainant, to wit: after the HP foreman checked the appropriate air samples for levels of contamination, the air quality was further analyzed by Respondent (Mr. Thurmond and Mr. South). Although Mr. South's visual inspection, by itself, seemed a bit weak, both the HP foreman and Mr. Thurmond checked air samples which corroborated Mr. Thurmond's more thorough investigation of the work area.[8] At that point, Complainant's refusal to work lost its protected activity status. *Pensyl, supra*, at 7. As such, Complainant failed to prove his *prima facie* case based upon his refusal to work as a protected activity. Respondent had no further indication of why Complainant was still refusing to work, as Complainant did not at that time state that he

wanted to see test results or why he did not believe Respondent's evaluation of the work area. Had Complainant inquired further or had he more expertise or knowledge of contamination prevention or dust detection, Respondent might have been required to further explain and

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display the safety of Complainant's work area. Absent such further inquiry, I find Respondent adequately responded to Complainant's voiced concerns.

2. Reporting Safety Complaints

Complainant also alleges, as a protected activity, that he was terminated for refusing to work in the condenser bay without a dust mask because he makes safety complaints (F-75). Specifically, Complainant noted that he made two safety complaints prior to his refusal to work on March 25, 1990 (F-68, F-69). On March 23, 1990, he reported to an HP an exposed pipe with resulting insulation, which was repaired (F-68, F-162). The exposed insulation was asbestos, which was removed quickly, according to Mr. Jankovich (F-162). Complainant also reported a missing toe board on a scaffold in the "B" box of Complainant's work area (F-69). According to Complainant, cans of material on the scaffold could easily roll off the scaffold, without the toe board, resulting in a hazard to the boilermakers (F-69). The toe board was replaced that same day (F-69). Complainant opined that these safety complaints, coupled with his refusal to work, motivated Respondent to terminate him whereas other employees who refused work assignments were, according to Complainant, treated less severely (F-75).

Concerning the adverse action portion of Complainant's *prima facie* showing, Respondent stipulated that it took adverse action in the form of a termination against Complainant, although it disputes that such action was illegally motivated (Respondent's post-hearing brief, p. 17 n. 5). In addition to showing that Respondent took some adverse action against him, Complainant's evidence must be sufficient to raise the inference that the likely reason for the adverse action was the protected activity. *Dartey, supra*, at 7-8. For the reasons listed hereafter, Complainant has failed to satisfy this burden.

Complainant did not allege that he received unusual, or disrespectful treatment when he made the complaints about the exposed pipe insulation and missing toe board. In fact, these problems were quickly repaired. It was not until Complainant refused to work that Respondent showed any level of adverse action against Complainant.

The only factor weighing in Complainant's favor is the

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timing of the discharge. The discharge took place two days after Complainant noted the exposed pipe insulation on March 23, 1990. While such timing does make the termination slightly suspect by itself, Complainant has not provided any other evidence to connect the termination with the previous safety complaints. Complainant's allegations that other workers who refused to work were treated less harshly are unsupported, and less credible, assertions to which I assign no weight. Complainant has not offered evidence which would tend to prove that any other workers refusing to accept a work assignment under similar conditions were treated any more favorably than he. Respondent, on the other hand, has provided a list prepared by its personnel which outlines other workers who have been discharged for refusing work assignments (Rx-19, F-106, F-108, F-109). While this list does not disprove Complainant's assertions (as it is unclear whether the list includes all employees who refused to work or just those who were terminated for such refusal), Respondent does not bear the burden of proving the causal relationship between Complainant's activities and his termination. The testimony of Mr. South and Mr. Thurmond establishes that Complainant was terminated only for his refusal to work. In addition, Respondent went to significant lengths to investigate, and explain the safety of the work area to Complainant. Respondent gave Complainant opportunities to change his mind concerning his refusal to work, and the ultimate decision of whether to work remained with Complainant. I find that Complainant's reports to safety personnel concerning the exposed pipe insulation and missing toe board played no part in Respondent's actions against him. Complainant was discharged entirely because he improperly refused a work assignment. Further, according to Respondent's own work rules of which Complainant was aware, there were no other alternatives available for an employee who unjustifiably refuses a work assignment. Complainant has offered no probative or reliable evidence tending to prove that his participation in reporting the exposed pipe insulation or the missing toe board caused him to be treated even minimally less favorably by Respondent. Therefore, Complainant has failed to meet his burden of proof, and has thus failed to establish his *prima facie* case. *Lopez v. West Texas Utilities*, 86-ERA-25 (Decision and order of the Secretary of Labor, July 26, 1988); *Dartey, supra*.

A failure to prove any prong of the *prima facie* case results in dismissal of the underlying claim. As the prong concerning

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whether the adverse action had some causal relation to the alleged protected activity is dispositive of whether Complainant has proven his *prima facie* case, I will not address the other two prongs. Specifically, I need not decide whether Complainant engaged in protected activity by reporting the safety problem, or whether Respondent was aware of these complaints.

As Complainant has failed to prove a *prima facie* case by, either of the above alleged protected activities, it is recommended that this matter be dismissed.

RECOMMENDED ORDER

It is recommended that the complaint of Robert F. Stockdill be DISMISSED.

JAMES GUILL
Associate Chief Judge

APPENDIX

A. BACKGROUND

a. Complainant

1. Complainant worked as a boilermaker for 20 years, and had prior jobs at a steel mill, with ironworkers, and as a book salesman (Tr. 92).

2. The parties stipulated that Complainant was employed as a boilermaker by Respondent, Catalytic Industrial Maintenance, Inc. (CIMCO), at Plant Hatch on March 25, 1990, the date of the alleged violation of the Act (Tr. 13-14) and had been since January of 1990 (Tr. 14).

3. The parties stipulated that Complainant, Robert P. Stockdill, Sr., filed his complaint on April 13, 1990 and request for hearing on May 22, 1990 (Tr. 16, 17).

4. Complainant testified that he has also filed a complaint concerning his termination under the occupational and Safety Hazards Act (Tr. 27).

b. Witnesses

5. Thomas Hart is a Site Superintendent for CIMCO at the Edwin I. Hatch nuclear plant. Mr. Hart has worked in nuclear maintenance for approximately 14 to 15 years (Tr. 112). As site superintendent, Mr. Hart is the highest management official for Respondent at Plant Hatch (Tr. 156). Mr. Hart supervises other areas in addition to the condenser bay (Tr. 156). Respondent, CIMCO, was a subcontractor for Georgia Power Company, which was the operator at Plant Edwin I. Hatch (the nuclear power plant) (Tr. 11).

6. Lannie South is a superintendent for Respondent CIMCO and has held that position for nine years (Tr. 243).

7. Mr. Roger Zavadoski is the Manager of Health Physics and Chemistry at the Plant (Tr. 377). He has held that position for approximately seven years (Tr. 377). Mr. Zavadoski holds a bachelor of chemical engineering degree and a PhD in Chemical and Nuclear Engineering. In total, he has approximately 20 years of experience in commercial nuclear power plants, including nine years of experience with the Atomic Energy Commission

and Nuclear Regulatory Commission (Tr. 378). Mr. Zavadoski supervises 90 various workers involved with health physics (Tr. 386).

8. Wesley Purvis is employed by Georgia Power as the Health Physics Foreman for the condenser bay area (Tr. 182). Mr. Purvis worked the day that Complainant was discharged (Tr. 182). Mr. Purvis supervised Mr. Jankovich (Tr. 316).

9. Arthur Jankovich has been a health physics (HP) technician for approximately 11 years (nine of those years as a senior HP) at various power plants, and worked at Plant Hatch during the week when Complainant was terminated (Tr. 271). Mr. Jankovich was employed by Applied Radiological Controls (ARC) and was assigned to the health physics department at Georgia Power, although he no longer works at Plant Hatch (Tr. 315). Mr. Jankovich said her is concerned with employment possibilities because he testified at the hearing and because of his union activities (Tr. 405).

10. Samuel Thurmond is a safety engineer and asbestos supervisor for Respondent, and has held that position for 12 years (Tr. 327). Mr. Thurmond also served as the asbestos supervisor for the past eight years (Tr. 327). Mr. Thurmond is EPA certified and licensed by the State of Georgia to do asbestos removal.

C. THE WORK AREA

a. Condenser Bay Area

11. The area where Complainant worked is a condenser bay, located beneath the main turbines in the turbine building at Plant Hatch (Tr. 113). Complainant had worked on this particular job, of pulling tubes, for approximately 3 or 4 days. Complainant had also worked in that area during other jobs (Tr. 80).

12. The work area, including the four boxes, was approximately fifty feet wide by approximately sixty or seventy feet long (Tr. 354).

13. In the condenser bay (conbay) where Complainant worked, there are two condensers, with four water boxes (four inlet boxes and four outlet boxes). A condenser tube cools down water after it comes out of the steam turbines (Tr. 82). The condensers turn the steam from the turbine back into water so that it can be recirculated through the plant and processed into steam again (Tr. 113). These boxes, or work areas, were labelled "A," "B," "C" and "D". Rx-1 is a picture of the check-in desk and access control point to the condenser area (Tr. 114).

b. Pulling Tubes

14. The pulling of tubes is the removal of tubes from the condenser (Tr. 77). Tubes were pulled at a rate of approximately 15 to 20 at a time (Tr. 78). Rx-4 is a picture of boilermakers, hooking a cable to tubes in the process of pulling tubes out of the water

box. (Tr. 116). Rx-5 is a picture of a boilermaker at the tubes, attaching a pulling device to the tubes (Tr. 117).

15. The parties stipulated that Complainant's duties included assisting in the process of removing tubes located in the condenser bay (Tr. 14). This replacement took between two and three months to complete (Tr. 80).

16. The tubes are approximately 40 feet long. There are approximately 10,000 tubes per water box, 40,000 total in the condenser (Tr. 117). Each tube is approximately three-quarters of an inch in diameter (Tr. 77).

c. Workers

17. Removing tubes involves different workers. One group pulled tubes. Another group wrapped the tubes and removed them.

18. Workers were constantly cleaning the platform in the condenser bay area (Tr. 122). Laborers stripped the platform approximately twice a shift, removed the "A" cloth and put down a new "A" cloth due to the amount of water used to wetten tubes (Tr. 123). An "A" cloth is a heavy plastic or paper used to cover areas, prevent contamination and collect moisture (Tr. 123).

19. Fifteen laborers were assigned to clean the condenser bay area on the day shift, and ten on the second shift (Tr. 142-43). Four laborers were assigned to the scaffold (Tr. 143). Mr. Hart was not certain whether it was laborers, or carpenters, who cleaned the "A" cloth approximately twice during a shift (Tr. 143). Platforms' "A" cloths were changed at different times (Tr. 145).

20. Mr. Jankovich testified that he had seen laborers cleaning up the condenser bay area when he requested them, and on other limited occasions (Tr. 281). The laborers did not remain in the area during the entire pulling operation (Tr. 281). Laborers were responsible for removing the 'Al cloth from the platform (Tr. 282).

d. Shifts

21. Boilermakers worked on each hole shot between sixty and ninety minutes (Tr. 78). These shifts were maintained because the work area was very hot (Tr. 78). The heat factor was also affected by the protective clothing (cotton clothing, nylon apron, rubber gloves and boots, and a hard hat) which some workers had to wear (Tr. 79). These short shifts reduced the amount of accumulated exposure to allegedly meet Federal guidelines (Tr. 78-79, 122-23).

22. Boilermakers were able to pull tubes approximately three or four times during a shift (Tr. 139). It took longer to remove the tubes from the area than it did to pull them from the condenser (Tr. 139).

e. Complainant's work

23. Complainant, the worker nearest the tube sheet panel, attached a rope around the tubes to prevent them from bouncing or separating from the bundle of tubes as they were pulled out (Tr. 77).

24. Complainant did not perform the type of work pictured in Rx- 7. That work involved putting the tubes back in the condenser, which occurred after Mr. Stockdill was terminated (Tr. 136).

25. Mr. Hart first stated that the tubes were pulled in a downward progression (Tr. 178). Later he acknowledged that the tubes must have been pulled by an upward progression, as the scaffolding was raised during the process (Tr. 178). Tubes were then replaced from the top downward (Tr. 178-79).

f. Work Platforms

26. Complainant worked with a group of boilermakers assigned to pull tubes from the condenser in "A" box (Tr. 113). There were four boxes, as work areas, in the conbay. The picture labelled Rx-6 shows boilermakers on several platforms pulling tubes (Tr. 117).

27. Workers at the "A" and "B" platforms would not receive higher levels of radiation if they worked close to the sheets, due to the low level of radiation at those platforms, according to Mr. Purvis (Tr. 230). Tests which Mr. Purvis performed indicated that dose rates at the "A" and "B" platforms were approximately one tenth of the rates at the "D" platform (Tr. 230-31). Cx-5 is a picture of "A" and "B" boxes, undraped as they were not radiologically hot, according to Complainant (Tr. 51).

28. Complainant did not work in "D" box (Tr. 71).

29. Rx-2 is a picture of the work platform in front of the condenser, identified by Mr. Hart, showing where tubes had been removed from "B" box (Tr. 114-15). Mr. Hart subsequently stated that the tubes in the upper portion of Rx-2 did not appear to have been removed (Tr. 134).

30. According to Mr. Hart, the tubes in D box were more contaminated than tubes from the other boxes (Tr. 171). As a result, only small sections of tubes were pulled at one time from that box (Tr. 171). Cx-2 shows plastic sheets lining "D" box (Tr. 42-43). Cx-4 is another picture of D box with its plastic draping (Tr. 49-50).

31. According to Mr. Thurmond, the draping between boxes was to prevent splashing, not dust, as he was not aware of dust in that area (Tr. 354).

32. According to 14r. Hart, Cx-2 represents "D" box (Tr. 168). Mr. Hart explained that one worker in that picture is using a tag line to control tubes (Tr. 169). The workers are hoisting, rather than pulling, tubes in that picture (Tr. 170). Herculite (the plastic sheets)

is covering most of the work area, except where the tubes are being pulled from (Tr. 170).

33. Mr. Hart testified that there is generally localized contamination on the tubes (Tr. 113).

g. Wetting Down Tubes

34. While the condenser is operating, running water cools the tubes and steam results around the outside of the tubes (Tr. 164). No water had run over the tubes, in that process, since February 18 (Tr. 164). Approximately a month passed without water being run over the tubes, prior to the wetting process during pulling (Tr. 165).

35. Mr. Purvis identified the discolored material on the condenser tube, in Cx-3, as an oxide layer on the tubing. The shinier material on the tubes is where the tube was cut (Tr. 213).

36. Each condenser has water boxes which were replaced by pumps that wetten the tubes for pulling. Mr. Jankovich testified that the system used to wet down tubes was a long pipe which was connected to a water hose (Tr. 272). Water is pumped from the bottom of the condenser, sprayed on the top of the tubes, and then filtered down the tubes as they are pulled out. This wetness lubricates the tubes and keeps airborne contamination, such as dust from the tubes, from being released (Tr. 126, 157). The wetness would not have any effect on radiation (Tr. 158-59).

37. Wetting the tubes allowed the workers to work without respirators during much of the tube removal (Tr. 173).

38. If any tubes were pulled out dry, the pulling operations were postponed until the tubes were positioned to be wettened, according to Mr. Jankovich (Tr. 272).

h. Protective Clothing and Ventilation

39. Rx-3 displays boilermakers putting on plastics which go over the protective clothing, and wearing face shields (Tr. 116). Mr. Hart noted that the aprons were probably made from nylon, rather than plastic (Tr. 135).

40. Radiation results in the emission of radioactive waves, because of atom disintegration (Tr. 174). Contamination includes gases or particles of material which are radioactive (Tr. 174). Protective clothing is used to protect workers from contamination, not radiation (Tr. 174, 207).

41. The purpose of the face shield is to prevent water vapor from going into the workers' faces. The face shield also prevents workers from touching their gloved hands to their face (Tr. 116).

42. Rx-8 depicts a bundle of tubes being transferred as part of their removal from the work platform (Tr. 119). The workers are wearing face shields, plastics and taping (Tr. 120).

43. Complainant would have been required to wear the face shield, according to Mr. Hart, while working in the condenser area (Tr. 120). Complainant also was required to wear PC's, plastic aprons and gloves (Tr. 120).

44. According to Mr. Hart, the plastic shield face mask prevents workers from touching their hands to their face and possibly spreading contamination from their gloves (Tr. 137). The plastic shield face mask also protects workers when they are using aquipment, such as when they are sawing tubes (Tr. 137).

45. In Rx-7, although all workers are in radiologically controlled areas, one is a clean area and one is a potentially contaminated area. Rx-7 shows, according to Mr. Hart, that workers can be in close proximity to one another, and may still require different protection (Tr. 118). This is because radiation only eminates a certain distance. (Tr. 159).

46. Rx-9 shows workers hoisting a bundle of tubes. The workers close to this work are dressed in plastics, except for an observer which is out of the work area (Tr. 120-21).

47. There can be a health hazard involved from radiation, according to Mr. Purvis (Tr. 207).

48. Radiation exposure is measured by the amount of accumulated exposure a worker can receive in a given time, not by the dose rate itself (Tr. 215). The dose rate of radiation drops off as distance from the radioactive matieral increases (Tr. 216).

49. Respirators were always required when workers pulled stainless steel tubes (Tr. 220). Otherwise, respirators were only required if there was a potential for airborne hazard (Tr. 220).

50. The parties stipulated that Complainant worked pursuant to a Radiation Work Permit (RWP) authorization (Tr. 15). The Radiation Work Permit for the specific project determines what types of protective clothing is to be worn by workers in the area under the RWP (Tr. 383).

51. According to Mr. Jankovich, stainless steel tubes were pulled by workers who wore respirators (Tr. 299). Mr. Jankovich was not involved with any stainless steel tube pulling (Tr. 299). Mr. Jankovich was not aware whether any workers assigned to Complainant's RWP pulled stainless steel tubes, as he did not work on that RWP (Tr. 300).

52. Mr. Zavadoski testified that the RWP governing the tube removal in the condenser bay area required respirators for stainless steel tube pulling (Tr. 384).

53. According to Mr. Jankovich, workers who were not qualified for a respirator could not wear them, and the decision as to whether a worker could wear a respirator ultimately lay with the HP foreman (Tr. 317, 318).

54. Mr. Hart said the condenser bay area is relatively clean and cool, and has an exhaust system which removes and circulates air in the area (Tr. 122). The condenser bay has a negative air ventilation system (Tr. 125). The negative air ventilation system exhausts more air than it pulls in. The system makes the air cooler than some other areas in the plant (Tr. 125).

i. Health Physics

55. Health Physics workers, or HP's, were constantly on the platform while the tubes were being pulled and replaced, according to Mr. Hart (Tr. 118).

56. Most HPs work for Georgia Power. A subcontractor, ARC, also provides additional health physics technicians at Plant Hatch (Tr. 136).

57. HP's determine the areas where workers must wear respirators, when protective clothing is worn, and other precautions (Tr. 119). Mr. Jankovich testified that one of the duties of an HP is to make sure that, if tubes came out dry, operations were stopped until the tubes could be wettened (Tr. 272).

58. As an HP, Mr. Jankovich had the authority to stop the work if a situation was deemed hazardous enough (Tr. 315). Mr. Jankovich also had the authority to report all other hazards (Tr. 315).

59. Rx-7 depicts boilermakers installing new tubes in the condenser. To the left of the tape in the picture, the workers in street clothes are HP's (Tr. 117-18).

j. Radiation Meter

60. Cx-3 is a picture of a monitor near a water box in "D" box (Tr. 49). The Eberline meter is near the brass tubes, according to Complainant.

61. The hand-held meter is called a frisker, which is used to locally measure radiation (Tr. 161). An HP uses the frisker before, and during, the pulling of tubes (Tr. 162).

62. Mr. Purvis identified the instrument, in Cx-3, as an Eberline R02A (Tr. 195). The meter measures a dose rate, or rate of radiation per a unit of time (Tr. 195-96). These hand held meters are used at some other nuclear plants as well (Tr. 198).

63. The meter measures radiation, and not contamination (Tr. 196). Mr. Purvis indicated that he could not tell what reading the meter was giving, but stated that if the switch was pointed toward a battery check the meter would give indicate the high reading which it showed in the picture (Tr. 196). Mr. Purvis also stated that, as the meter was located near

the condenser tubes, the radiation possibly indicated is not an unusual health hazard (Tr. 198).

64. Mr. Hart stated it would be difficult to ascertain what the frisker in Complainant's picture was reading (Tr. 162, 168).

65. The dial selector switch on the meter does not require the operator to hold it at the battery check position, as it does not return to the off position on its own (Tr. 204-05).

k. Work Procedures

66. Rx-10 is a copy of the General Maintenance Procedure, Maintenance Housekeeping and Tool Control, which includes the housekeeping procedures governing the work on the condenser and pulling of the tubes in general (Tr. 124). The procedures are reviewed with each individual who works in the condenser bay, according to Mr. Hart (Tr. 124). Every employee is expected to follow these procedures (Tr. 124).

67. Each employee who works at Plant Hatch receives formal training, which includes general employee training, respiratory training, emergency disaster training and security training (Tr. 128). Mr. Hart stated that Complainant received such training in a one-day period (Tr. 128).

C. EVENTS LEADING TO COMPLAINANT'S DISCHARGE

a. Complainant's testimony

68. Complainant testified that on March 23, 1990, he asked that a pipe with exposed insulation be covered (Tr. 24). Complainant said he thought it looked like asbestos insulation (Tr. 24). Complainant explained that he did not have "concrete" knowledge whether the insulation was asbestos (Tr. 35). Cx-6 is a picture of the pipe and asbestos insulation Complainant noted to an HP (Tr. 56).

69. Complainant testified that he observed a missing toe board on a scaffold in "B" box (Tr. 24). As a result of this missing toe board, cans on the scaffold fell over and rolled off, according to Complainant (Tr. 25). Complainant stated that a Health Physic (an HP) was standing nearby after Complainant reported the toe board problem, and later that day the toe board was replaced (Tr. 25).

70. Complainant testified that on March 24, 1990, he noticed that his throat was becoming scratchy and his nose dried out (Tr. 25). That same day, Complainant waved his hand in the air and could see dust particles and fibers up to a quarter inch long (Tr. 25). Complainant testified that he requested an HP to stop the pulling because dry tubes were pulled on March 24, 1990 (Tr. 85, 88). After asking Alfred McDonald, his foreman, if he could wear a dust mask, Complainant was told he could only wear a respirator as dust masks were not approved for use (Tr. 25).

71. On March 25, 1990, while dressing out for work, Complainant requested a respirator at the sign-in desk (Tr. 25). Complainant testified that he was told that he wasn't qualified to wear a respirator, at which point Complainant requested if he could wear a dust mask (Tr. 25-26). Complainant stated that he was told by a technician that he could wear a dust mask, and that the technician gave him a dust mask and an extra for anyone who requested it (Tr. 26).

72. Complainant stated that it was speculation on his part, beyond his viewing of floating dust particles, that there was airborne radiological contanimation, and that the only knowledge he had of radiological contamination control was gained through classes at work (Tr. 93).

73. After Complainant received the dust mask, he proceeded to the HP conbay desk. The HP, Mr. Purvis, asked who authorized the wearing of a dust mask within the RWP (Tr. 26). Complainant was told by the HP to wait until the HP could verify whether Complainant could wear the mask (Tr. 26). Complainant testified that there was an open box of dust masks in the HP's office.

74. Later, on March 25, 1990, Complainant told Mr. Thurmond that dry tubes had been pulled on March 24 and that he wanted to wear a mask or respirator (Tr. 88). Complainant stated that Mr. Thurmond and Mr. Purvis told him they thought the area was safe, and that the particles were "just nuisance dust" so that a respirator or dust mask were not necessary (Tr. 90).

75. Complainant testified that he was told by Bill Burton (otherwise unidentified) that dust masks were used on the previous night shift by some of the men, including use by Larry Hardigree (also unidentified) (Tr. 26). Complainant also testified that Mr. Burton told him that men were required to use respirators, double PC's and plastics on the night shift. As some of the men were not respirator qualified, Complainant testified that Mr. Burton told him three workers were transferred to another crew to load out tubes while respirator-qualifed workers pulled the tubes (Tr. 27). Complainant argued that he should have received the same treatment, rather than being fired (Tr. 27). Complainant alleges the treatment he received was due to his safety complaints (Tr. 27).

76. Complainant had not reported to his work station when he arrived at the HP desk with the dust mask on, but said he could see the work area from the conbay check-in desk (Tr. 71, 83). He maintains that he was "going by what happened the day before," concerning what he had heard about the previous day's pulling of tubes, when he arrived with the dust mask (Tr. 72).

77. Complainant did not recall being told by either Mr. Thurmond or Mr. Purvis on March 25, 1990, that they had done any air samples or had gone to the conbay to inspect it, but that an HP, Mr. Jankovich, told him more about it a day or two later (Tr. 90). Complainant testified that Mr. Jankovich told him routine air samples were taken approximately 15 feet from tube sheets, but Complainant didn't know if air samples were taken within his "immediate breathing zone" (Tr. 28).

78. Complainant testified that Mr. Burton was told that a senior HP was informed by the "company" that if wearing respirators was a "close call" the men should be allowed to work without them so that the work would get finished (Tr. 26-27).

79. Complainant explained that, after the HP questioned his wearing a dust mask, he was told by a CIMCO safety representative, Sam Thurmond, to return to the boilermakers' change shack and await instructions while Mr. Thurmond and Mr. Purvis checked things out (Tr. 28, 86). Complainant was not aware whether they checked out the Conbay area on their way back from their offices (Tr. 87).

80. Complainant said the foreman, Alfred McDonald, in the presence of an unidentified boilermaker steward, asked if he would go into the conbay "on the next hole shot" (Tr. 29, 84). Complainant asked if he could go in with a dust mask and was told "no" (Tr. 29). The foreman asked the boilermaker steward to talk to Complainant. According to Complainant, the steward told him that CIMCO would fire him if he refused to go into the work area (Tr. 29).

81. Complainant testified that he refused to go to the work area because of his belief that there was radiologically contaminated dust in the air and that workers were pulling dry tubes (Tr. 84). It is not unusual for condenser tubes to have radiation, according to Complainant (Tr. 69). The radiation on the tubes itself was considered a possible health hazard by Complainant, and especially so if they were pulled out dry (Tr. 69). Complainant's concern was that airborne contamination could come from "D" box over into "A," "B," and "C" boxes (Tr. 71).

82. As neither Mr. Purvis nor Mr. Thurmond provided Complainant with any written data or test results, Complainant testified they had not convinced him that the work area was safe (Tr. 85-86).

83. Complainant stated that he did not believe it was possible to keep radiological contamination from being airborne around boxes "A," "B," and "C" (Tr. 31).

84. Complainant testified that some tubes were pulled out dry (Tr. 28). He claimed that, specifically on March 24, 1990, tubes came out dry (Tr. 37). Complainant alleged that air samples were not taken where he worked, immediately adjacent to the tube sheet. He also stated that air samples were not taken when tubes were pulled out dry on March 24, 1990 (Tr. 37).

85. According to Complainant, sheets of plastic approximately five feet high were used to make a wall between certain boxes, where tubes were pulled (Tr. 36). "D" box was where Complainant was concerned that there was a "highly reasonable chance" that dust might become radiologically contaminated and be carried over the plastic sheets to other work areas (Tr. 38).

86. Complainant testified that after his refusal to work without a mask, the steward took him to have his exit interview and other final procedures (Tr. 29). No airborne contamination showed in exit body count tests performed on Complainant (Tr. 93).

87. Complainant testified that Mr. Burton told him that some workers who pulled the brass tubes were noticing red dust or blood when they blew their noses. Complainant also testified that he had blood in his mucus (Tr. 30). Complainant was sick for two days after his termination (Tr. 36).

88. Complainant stated that he heard from Charles Gillman, presumably another boilermaker, that workers wore double PC's, plastics and respirators on the morning of March 26, 1990, the date following his termination (Tr. 30). Complainant was also told that, in the fall of 1989 during the last retubing, workers were dressed in double PCs and plastics (Tr. 38).

89. Complainant has been treated for bronchitis several times (Tr. 34). One of these treatments he relates to an on-the-job exposure to fiberglass and dust in the air with a previous employer (Tr- 34-35). After that exposure, the previous employer instructed employees to wear dust masks or respirators (Tr. 35).

90. Complainant also alleged that his termination was unjustified because he was not shown any data of air sample test results when he questioned the presence of dust (Tr. 37, 72, 75). Complainant also noted there was a "breakdown of reliability of the HPs" due to an alleged pending unionization and strike (Tr. 37).

91. Complainant received training for working within a nuclear power plant, and specifically received the work rules to work at Plant Hatch (Tr. 73). He was aware that if he unjustifiably refused to go to an assigned work location, that he could be terminated and then eligible for rehire (Tr. 73).

92. Complainant was not aware of any work rule which provides for sending employees to another location if they refuse to work in their assigned location (Tr. 74). However, he alleged that other workers were transferred in situations similar to his (Tr. 76).

93. Complainant testified that his termination, on March 25, 1990, "was unwarranted and due to a safety-related matter that should have been handled in a much different manner" (Tr. 24). Complainant alleged that the termination displayed Respondent's animus for Complainant's voicing of safety concerns (Tr. 24).

b. Mr. Hart's testimony

94. In general, when the workers were pulling tubes, Mr. Hart testified that he went to the condenser bay, or directly above it, approximately three or four times a day (Tr. 121-22). Usually, he checked the area twice in the morning and twice in the afternoon during the workers, twelve-hour shifts (Tr. 140). Sometimes he checked the area when workers were pulling tubes, and at other times workers were loading tubes (Tr. 156).

95. Mr. Hart said the health physics department makes air samples at least three or four times during a shift to test for radioactive material (Tr. 160). Later in the hearing, Mr. Hart stated that he was uncertain how many times in a shift air samples were taken (Tr. 180). It is Georgia Power's responsibility, according to Mr. Hart, to monitor air samples (Tr. 160).

96. Mr. Hart stated that he had not seen, nor heard about tubes being pulled dry (Tr. 138). Mr. Hart also stated that if a tube was pulled out dry, the pulling operation would be shut down and the pumps would be readjusted (Tr. 141). There are also sprinklers on the platform which could wet down a section of a tube which came out dry or which was being sawed (Tr. 141, 157). No one worker was assigned to wet down the tubes.

97. Mr. Hart felt that the removal of tubes from the condenser was not rushed (Tr. 146).

98. If a pump malfunctioned, a tube could be pulled out dry, according to Mr. Hart (Tr. 165).

99. Mr. Hart stated that there have been problems, "from time to time," with the pumps which placed water on the tubes during pulling (Tr. 138). Certain boilermakers were assigned to fix these pumps and adjust the sprinklers (Tr. 138).

100. Water from the pumps was occasionally relocated (Tr. 176- 77). Mr. Hart stated that if tubes had been pulled during this time, they would have come out dry or damp (Tr. 177). The location of the spray was also periodically adjusted, to adequately wet the tubes (Tr. 177).

101. The exhaust system did break down and was out of service for several days for maintenance work during a period of outage prior to Complainant's discharge (Tr. 137). As there are two exhaust units, Mr. Hart did not remember anything else being gone to exhaust the air (Tr. 138).

102. Mr. Hart believed that the Herculite, or plastic draping between boxes, would prevent loose contamination, or splashing water, from going into another work area (Tr. 171).

103. Also shown in Cx-3, with the frisker, is a material which appeared to Mr. Hart to be rust on the tubes (Tr. 166). Mr. Hart stated that the material was a stain or rust, not a loose particle (Tr. 167). Later in the hearing, after Mr. Hart stated that brass could not rust, he called the material condensate which could easily be scraped off while the tubes were being pulled (Tr. 176).

104. Rx-18 is CIMCO's work rules for Plant Hatch (Tr. 131). On page 2, category 2, is the work rule which applied to Complainant's termination (refusal to work provision) (Tr. 132). Mr. Stockdill received a copy of these work rules.

105. Respondent incorporated Georgia Power's work rules within its own work rules, and extended them to a degree (Tr. 153). The rule concerning termination, for refusal to work, is one of Respondent's rules (Tr. 154).

106. Mr. Hart stated that, by procedure, an employee who refuses a work assignment without justification is terminated for 30 days on the first offense (Tr. 128). Mr. Hart noted that at least six other employees were terminated for refusing to work since January 2, 1990 (Tr. 128). Such employees, including Complainant, are eligible for rehire after one month (Tr. 129).

107. Although there is no set time or procedure used when an employee refuses to work in a certain area, Mr. Hart said the employee is allowed to give his reasons and talk to his union steward (Tr. 150). The rules which apply to refusals to work were negotiated with the various trades (Tr. 151).

108. Rx-19 is a list of other personnel who have been terminated for refusing a work assignment at Plant Hatch since January 1, 1990. Including Complainant, there are seven people on the document (Tr. 130). All of the persons on the list, according to Mr. Hart, were treated the same (Tr. 130-31).

109. Mr. Hart did not recall the circumstances which caused the various employees, listed on Rx-19, to refuse to work (Tr. 152). 110. Complainant would be eligible for rehire if he was referred by the union hall for any boilermaker openings Respondent had available, according to Mr. Hart (Tr. 151).

111. According to Mr. Hart's testimony, the complaint concerning airborne contaminants and dust, filed with the U.S. Department of Labor, was investigated by Conan Pinkstaff of the Department of Labor (Tr. 127). 14r. Hart testified that Mr. Pinkstaff investigated the situation and found that the area was safe for a reasonable man to work in (Tr. 127). According to Mr. Hart, Mr. Pinkstaff interviewed Lannie South, Mr. Thurmond, Mr. Zavadoski (the manager of health physics at Plant Hatch), Mr. Purvis, Charles McDonald and a few other boilermakers (Tr. 127, 148). Mr. Pinkstaff did not interview the workers at Plant Hatch, but conducted his investigation over the telephone, Mr. Hart explained (Tr. 147).

c. Mr. Purvis' testimony

112. Mr. Purvis stated that, on March 25, 1990, Complainant was brought to his office by one of the technicians, and that Complainant asked if he could wear the dust mask in condenser bay area (Tr. 183).

113. Mr. Purvis did not know Complainant before he came to his office on March 25, 1990 (Tr. 224).

114. Mr. Purvis stated that Complainant had not gone into the work area, but only went to the control point where his technician was located (Tr. 183). The control point is approximately 25 feet from the work area (Tr. 183-84).

115. Mr. Purvis explained that it is against Georgia Power's company policy for a worker to wear a dust mask in a radiologically controlled area. Due to the danger of transferred contamination from a gloved hand to the face, Mr. Purvis said dust masks are not allowed in that area (Tr. 184).

116. Upon receiving Complainant's concerns on March 25, 1990, Mr. Purvis said he called his control point to check whether there had been any radiological problems. He said he had that morning looked over the test results from the previous shift before Complainant requested the dust mask (Tr. 184-85, 91). The air surveys, according to Mr. Purvis, did not require the wearing of respiratory protection (Tr. 185).

117. Rx-11 includes air sample test results obtained at Plant Hatch (Tr. 187). The results in the center of the sheets, from the turbine building at 130 elevation, represent those tests performed at the conbay pulling platform (Tr. 187). Grab samples are measured at 85 liters per minute, while the flow rate for low-vol samples is 37.05 (Tr. 189). Mr. Purvis stated that these test results were below the limits which require respiratory protection (Tr. 187). Also within Rx-11 are the results of smear survey tests (Tr. 189).

118. On Rx-11, where air sample readings are given under the label "activity," those readings determine the level of contamination and radiation (Tr. 235). For airborne radiological concerns, reference is made to the "total" block under MPC readings (Tr. 235-36). Mr. Purvis testified that none of the readings in Rx-11 indicated a radiological danger. (Tr. 236). 119. As foreman, Mr. Purvis recorded air sample results in his log book (Tr. 199). Mr. Purvis did not perform the tests himself on March 25, 1990, although he has taken air samples at other times (Tr. 199). Mr. Purvis had no firsthand knowledge of the tests performed on March 25, 1990, except for the test results he obtained (Tr. 201).

120. Mr. Purvis testified that he told Complainant there was no radiological airborne problem (Tr. 191). Mr. Purvis testified that Complainant appeared satisfied that there was not radiological airborne problem (7r. 191). To Mr. Purvis, Complainant's concerns regarding the dust was separate from his concerns over radiological conditions (Tr. 192).

121. Mr. Purvis testified that on March 25, 1990, he explained the air sample results to Complainant (Tr. 203).

122. Mr. Purvis testified that he did not show the results, located in Rx-11, to Complainant on March 25, 1990, because Complainant did not ask to see them (Tr. 203). If Complainant had asked to see the written test results, Mr. Purvis testified that he would have shown them to Complainant (Tr. 203).

123. After Mr. Purvis told Complainant there was no radiological airborne problem, Mr. Purvis said Complainant mentioned a bronchitis condition which the dust aggravated (Tr. 191). Complainant told Mr. Purvis that he had seen dust and fiber in the air on the previous day in the condenser bay platform area (Tr. 192). Mr. Purvis then explained to Complainant the problems associated with wearing a dust mask (Tr. 191-92). In specific, Mr. Purvis told Complainant that due to the loose-fitting nature of the mask, there is a possibility that a worker will attempt to adjust the mask with contaminated gloves (Tr. 192).

124. Mr. Purvis testified that the face shields would not prevent a worker from adjusting a dust mask, as the shield is retractable (Tr. 218).

125. The dust mask also has a tendency to move on a worker's face, according to Mr. Purvis (Tr. 218).

126. Mr. Purvis did not know who set the policy that workers in a radiologically controlled area could not wear dust masks (Tr. 231).

127. Mr. Purvis testified that, under National Institute of Occupational Safety and Health guidelines, a respiratory protective device must be certified by NIOSH to be allowed in a radiologically controlled area (Tr. 233). Mr. Purvis explained that a dust mask is not certified by NIOSH (Tr. 233).

128. HPS are instructed to remove workers from the work area, and check them for contamination, if a worker wears a dust mask in a radiologically controlled area, according to Mr. Purvis (Tr. 234).

129. Grab samples were taken as HP technicians deemed them necessary, or when they were instructed to take them (Tr. 204).

130. As Mr. Purvis was not qualified to investigate dust beyond the radioactive components, he referred Complainant to Mr. Thurmond (Tr. 192).

131. Mr. Purvis heard Mr. Thurmond tell Complainant that the asbestos and dust samples pulled did not indicate asbestos hazards (Tr. 227).

132. Mr. Purvis said that, to his knowledge, workers had not been allowed to wear dust masks on the shift prior to the morning of March 25, 1990 (Tr. 219). Mr. Purvis testified, however, that the workers on the prior shift could have used respirators (Tr. 219).

133. Respiratory protection would have been required, according to Mr. Purvis, when the stainless steel tubes were pulled on the B platform the night before March 25, 1990 (Tr. 237-38). Respirators were required that night because the sample level reached 50,000 CPM per hundred centimeters squared (Tr. 237-39).

134. Except for one section of highly contaminated tubes in the "D" box, Mr. Purvis testified that respirators were not worn in the condenser bay area where Complainant worked, unless the workers were pulling stainless steel tubes (Tr. 221-22). Mr. Purvis first testified that workers in the "A" box area, where Complainant specifically worked, did not wear respirators (Tr. 222). Respirators are not always issued, as they place an additional strain on workers by forcing them to breathe through the filters (Tr. 220).

135. Mr. Purvis testified that, to his knowledge, Complainant did not pull stainless steel tubes (Tr. 223). However, the test results for the night shift previous to March 25, 1990, indicate that stainless steel tubes were pulled from where Complainant worked, although not during his shift (Tr. 223). Mr. Purvis explained that, since stainless steel tubes were pulled the previous night, it was probable that those workers wore respirators (Tr. 224). It was not probable, according to Mr. Purvis, that those workers wore dust masks (Tr. 224).

136. Mr. Purvis knew of no tubes pulled dry from the condenser bay (Tr. 201). If a tube were pulled out dry, an air sample would have been taken, according to Mr. Purvis (Tr. 202).

137. It is the responsibility of HPs to report dust or fibers in the air, but HPs do not have the duty to investigate them beyond whether they were radioactive or required respiratory protection for radioactive reasons, according to Mr. Purvis (Tr. 193).

138. No HP working for Georgia Power reported to Mr. Purvis, the HP foreman, concerning a problem with dust or fibers in the air or a problem with radioactivity on March 24 or 25 of 1990 (Tr. 193).

139. According to Mr. Purvis, no HPs were qualified to sample air for fibers or dust, beyond the radiological concerns with that material (Tr. 208). Asbestos issues and dust samples were handled by Respondent (Tr. 208).

140. If an HP complained about dust in the air, it was Georgia Power's policy to pull an air sample and check for concentration of radioactivity (Tr. 194). An area would be evacuated if there was a contamination problem. If there was no problem, the dust concern would be turned over to other safety personnel who handle those issues (Tr. 194). There was no cause for invoking this procedure on March 23, 24 or 25 of 1990 (Tr. 194). A grab sample is pulled by a HP locally, for approximately 15 minutes, with a hand-held pump in various work areas (Tr. 185- 86). A low-vol sample is taken by a stationary pump in a particular location on a continuous basis (Tr. 185-86). A grab sample air survey can be used to verify results from low-vol samples (Tr. 186).

141. Mr. Purvis testified that there has been some contamination by airborne water or gases, but that the level is low in relation to the industry nationwide (Tr. 240). Mr. Purvis did not know the number of such incidents, however (Tr. 240).

d. Mr. South's testimony

142. Mr. South testified that on the morning of March 25, 1990, he was called by Mr. Thurman concerning Complainant's refusal to work without a dust mask (Tr. 243). Mr. South told Mr. Thurmond to check out the work area (Tr. 243). After talking to Mr. Hart, Mr. South went to two locations to check the work area. First, Mr. South went to the bottom elevation, below the platform area, and then Mr. South went up to a higher elevation and looked down at the work area approximately 30 feet away (Tr. 244). Mr. South did not go into the actual work area itself, but stood approximately 20 or 25 feet from it at one point (Tr. 245, 256). Mr. South testified that neither he nor Mr. Thurmond saw any dust or fibers in the work area (Tr. 244).

143. There was no work being performed in the area where Complainant would have worked which would have produced dust, according to Mr. South (Tr. 245). Mr. South also testified that there was no other activity in the area (Tr. 260). Approximately 20 workers were in the area when Mr. South viewed it for dust (Tr. 250). Mr. South specifically noted that there was no asbestos removal being performed in the condenser bay area, although he testified that there could have been asbestos removal in another area, controlled by a negative air tent (Tr. 245-46). 144. Mr. South testified that he did not attempt to shade his eyes from the light when he visually searched for dust (Tr. 252).

145. While testifying, Mr. South was asked whether he could see any dust approximately 20 to 25 feet away in the hearing room (Tr. 256). He testified, "If there was enough of it you possibly could, (Tr. 256). He also testified that he could say, by visual inspection, that there was no dust in the air in the hearing room (Tr. 257). Finally, Mr. South testified that, if there was dust in the work area, he could have seen it from 20 to 25 feet away (Tr. 257).

146. Mr. South did not recall ever seeing dust in the work area (Tr. 258). The work area is under negative pressure, which Mr. South explained would prevent dust coming to the area from other areas (Tr. 258). Mr. South also explained that, from one door, non-filtered air could come into the work area (Tr. 263).

147. Mr. South did not speak directly to Mr. Purvis concerning alleged dust, but only through Mr. Thurmond (Tr. 255).

148. After talking to Mr. Thurmond and Alfred McDonald (Complainant's foreman) during the morning of March 25, 1990, Mr. South told Mr. McDonald to tell Complainant to return to work. After Complainant still refused to work without a dust mask, Mr. South told Complainant's union steward to process Complainant for termination (Tr. 247-48). Mr. South said there was no reason to reassign Complainant, nor did he have a different work assignment for Complainant (Tr. 250). Mr. South also testified that there was "no reason" to send him home for that day (Tr. 251).

149. Mr. South testified that Complainant's work shift was to begin at 6:30 a.m. on March 25, 1990. Complainant was terminated at approximately 10 a.m. (Tr. 248).

150. Mr. South stated that he was not aware of any tubes being pulled out dry (Tr. 261). If one tube, or as many as five, were pulled out dry, Mr. South testified that he would not be able to see the dust coming off of one tube (Tr. 262).

151. Mr. South testified that on March 25, 1990, the water pumps were running, as he observed them from outside of the work area (Tr. 246).

152. Mr. South testified that he could not tell, by audial inspection, whether the pumps were putting out a full stream of water (Tr. 253). Mr. South did not know the flow rate of the pumps (Tr. 253).

153. Mr. South said that most of the other terminations for refusing to work are "outright refusals" to go into a certain area, rather than reasons similar to Complainant's (Tr. 251). Mr. South testified that no employees who were terminated for refusing to work were treated differently (Tr. 251).

154. Mr. South testified that he was not aware of other workers being reassigned after refusing to work (Tr. 255).

e. Mr. Jankovich's testimony

155. Mr. Jankovich testified that Complainant told him that, on the day before Complainant was discharged, Complainant had approached the HP on duty regarding tubes which were pulled dry (Tr. 272-73). Complainant told Mr. Jankovich that the HP on duty asked the boilermakers to pull one more row (Tr. 273). Mr. Jankovich had no personal knowledge of tubes being pulled dry (Tr. 310).

156. If a tube was pulled out dry, this would cause the tube to vibrate and loosen off particles from the tube (Tr. 278). Such particles, if dry, could become airborne, according to Mr. Jankovich (Tr. 279). Such particles would have the heaviest concentration in the breathing area of the two or three workers nearest the tube sheet (Tr. 279). If tubes were pulled out dry, Mr. Jankovich stated that he would have warned the boilermakers of the situation and suggested that they leave the work area (Tr. 317).

157. The ventilation system in the condenser bay area circulated and cooled the air well, according to Mr. Jankovich, but it could move particulates around the area (Tr. 278). However, Mr. Jankovich testified that all air samples were free of airborne contaminants (Tr. 278).

158. Mr. Jankovich said he was trained to detect asbestos in the air by shielding one's eyes from direct light (Tr. 283). The particles resemble snow dust, and Mr. Jankovich said there was more asbestos dust in areas where scaffolding and tenting were removed for asbestos purposes (Tr. 284).

159. Mr. Jankovich testified that, on several occasions during asbestos removal he had seen asbestos in the air (Tr. 282). Mr. Jankovich testified that discussion or action

concerning asbestos was "taboo," and that he would just report it (Tr. 282). As it was not a radiologcal concern, it was not within his job (Tr. 282-83). According to Mr. Jankovich, on one occasion he pulled an air sample concerning alleged asbestos and was told to throw it away (Tr. 283). Mr. Jankovich told other workers of the possible asbestos dust in the work area (Tr. 283).

160. As an HP technician, Mr. Jankovich testified that he is qualified to verify the possibility of presence of dust fibers (Tr. 313). Mr. Jankovich had training to recognize potential asbestos contaminants (Tr. 313, 319).

161. Mr. Jankovich told workers who took air samples that the equipment used for testing for asbestos was inadequate (Tr. 313- 14).

162. Mr. Jankovich reported the pipe, with exposed asbestos insulation, to the person who worked for Respondent who handled asbestos issues, after Complainant notified Mr. Jankovich of the problem (Tr. 285-86). Mr. Jankovich was told that the exposure was asbestos, and the exposure problem was taken care of (Tr. 286).

163. Mr. Jankovich was not assigned to observe the working conditions, where Complainant would have worked, on either March 24 or March 25 of 1990.

164. Mr. Jankovich testified that he was told not to stop a pulling operation unless there was a life-threatening situation (Tr. 317).

165. On page 1 of Rx-11, it is indicated that on March 24, 1990, stainless steel tubes were pulled from boxes "C" and "D" at approximately 4:15 p.m. (Tr. 321). Work at these boxes would have been approximately 8 to 10 feet from where Complainant worked (Tr. 322). Mr. Jankovich testified that this showed that stainless steel tubes were pulled on RWP 1527 (Tr. 323). This did not indicate whether respirators were required for this operation (Tr. 323). There was no radiological airborne safety hazard, according to Mr. Jankovich, referring to the breathing air zone samples in Rx-11 taken at that time (Tr. 324). A breathing air zone sample is taken within three feet of the work being done, or as close as is possible (Tr. 324).

166. On page 9 of Rx-11, at "B" box, a smear test result indicated it was performed on stainless steel tubes on the date Complainant was discharged (Tr. 305). The exhibit did not indicate to Mr. Jankovich that stainless steel tubes were pulled, but only that a smear survey was conducted (Tr. 306, 309). HPs were allowed, by a blanket RWP, to take such surveys (Tr. 306- 308).

167. The last air sample recorded on page 3, in Rx-11, indicates it was performed under RWP 1527, according to Mr. Jankovich (Tr. 303).

168. Mr. Jankovich testified that a workable hazard would be indicated by a reading above 50,000 CPM (Tr. 305). According to Mr. Jankovich, two readings were over this amount in Rx-11 (Tr. 305).

169. Mr. Jankovich testified that the area where routine air samples were conducted was approximately 12 to 15 feet from where Complainant was working in late March (Tr. 285). The pumps which pulled the air samples were not on the platform where tubes were pulled (Tr. 285).

170. Mr. Jankovich testified that, on several occasions, HPs had to caution boilermakers against pulling tubes too quickly and not taking safety precautions carefully (Tr. 279).

171. Concerning the alleged pending strike by HPs, Mr. Jankovich testified that there was animosity among some workers (Tr. 273).

172. Mr. Jankovich was not aware of radiological concerns or a breakdown in HP's work which could have raised radiological concerns (Tr. 294).

173. Mr. Jankovich was aware of one worker who while wearing an air respirator was nearly drowned after being doused with water (Tr. 287). According to Mr. Jankovich, this happened because the air line for the respirator was not properly bled (Tr. 287). Mr. Jankovich believed that this event occurred approximately three or four days before the strike at Plant Hatch (Tr. 287).

174. Mr. Jankovich identified the selector switch, on the meter pictured in Cx-3, as appearing to indicate a 50MR reading (Tr. 276). Other positions were identified for the battery check (Tr. 276).

175. Mr. Jankovich testified that the reading given by the instrument, in Cx-3, could be a breathable health hazard (Tr. 277).

176. Mr. Jankovich testified that he was aware that there were dust masks at the condenser bay work area (Tr. 279). Mr. Jankovich also knew that several workers on the night shifts work dust masks in the condenser bay work area (Tr. 279-80). As the dust masks were not devices for radiological control, Mr. Jankovich stated that instructions concerning the usage of dust masks were not handled by HPs (Tr. 280).

177. Mr. Jankovich testified that it was not an HP's job to prevent workers from wearing dust masks (Tr. 311). Mr. Jankovich was aware of policies and rules prohibiting the wearing of dust masks in radiologically controlled areas, but did not believe this applied to areas with other contaminants such as asbestos (Tr. 311-312).

178. Mr. Jankovich did not know why an HP would prevent a worker from wearing a dust mask (Tr. 280).

f. Mr. Thurmond's testimony

179. At approximately 7:30 a.m. on March 25, 1990, Mr. Thurmond received a phone call informing him that Complainant had concerns with working in the condenser bay area and that an HP technician had prevented him from wearing a dust mask (Tr. 328).

Mr. Thurmond testified that Complainant told him he had seen dust and fibers in the air on March 24, 1990 and that he did not want to go to the work area without protection (Tr. 328).

180. Mr. Thurmond told Complainant that the dust fibers were definitely not asbestos fibers (Tr. 328). Mr. Thurmond thereafter received a call from the HP who prevented Complainant from wearing the dust mask. The HP told Mr. Thurmond there was no radiological contamination problem in the condenser bay area (Tr. 328).

181. After talking to Complainant and the HP over the phone, Mr. Thurmond went to the office where asbestos log books are kept (Tr. 329). Asbestos removal had been ongoing since February 19, 1990 (Tr. 329). There were no air samples which indicated a level of concern or an action level as dictated by OSHA regulations (Tr. 329-30). Mr. Thurmond went to the HP's office and was told there had not been any significant dust problems (Tr. 331). Mr. Thurmond also did a "quick survey" of the work area by viewing the area in protective gear (Tr. 331-32). There was not any work in progress when Mr. Thurmond made the visual survey (Tr. 331)). Mr. Thurmond testified that he did not see any operations which would create dust or any dust otherwise (Tr. 332, 358-59). Mr. Thurmond explained that, in his safety experience, dust nuisance levels as indicated by OSHA will present a visible haze (Tr. 332-33).

182. Mr. Thurmond testified that he told Complainant that he did not see any dust in the work area, and that he had looked at the asbestos test readings which did not indicate asbestos dust (Tr. 341). Complainant then requested to be allowed to wear a respirator, although he was not respirator-qualified because of a blood pressure problem and fitting problem, according to Mr. Thurmond (Tr. 341). After this refusal to work without respiratory protection, Mr. Thurmond told Complainant to report to his foreman. Mr. Thurmond then called Mr. South to explain the situation to him (Tr. 343).

183. Rx-12 is a portion of the asbestos log entries kept at Plant Hatch (Tr. 333). The air samples are performed by an independent laboratory, Advances Analytical Laboratories, Inc. (Tr. 334). According to Mr. Thurmond, the samples were conducted in compliance with the proper procedures (Tr. 342). Rx-12 is composed of entries made for March 25, 1990 (Tr. 334, Rx-12). Air samples identified as "OSB," or outside barrier, are those which were taken in the work area and not in an asbestos removal tent (Tr. 334). Field sample #101, on page 1 of Rx-12, represents a reading taken from the area pictured on Rx-1, at approximately 9:20 p.m. on March 25, 1990 (Tr. 335). That sample indicated 41.5 samples per 100 grids, or 41.5 fibers (Tr. 335). This does not indicate that these fibers were asbestos (Tr. 335- 36).

184. The readings, included in Rx-12, were not the ones which Mr. Thurmond relied upon when he checked air samples before talking to Complainant on March 25, 1990 (Tr. 364).

185. According to the samples represented in Rx-12, Mr. Thurmond testified that there were no asbestos fibers in or near the condenser bay at the times tests were taken on March 25, 1990 (Tr. 336).

186. The fourth air sample on the second page of Rx-12 was also taken near Respondent's work area, at approximately 9:40 in the morning of the date Respondent was terminated (Tr. 361).

187. Rx-12 does not contain air samples, from Complainant's work area, which were taken before Complainant was discharged on March 25, 1990 (Tr. 362).

188. The action, or concern, level for dust fibers would have indicated a .1 reading on Rx-12 (Tr. 363).

189. The reading at the bottom of page 2 of Rx-12 was taken in the condenser bay area, but was within a "decon" tent with a negative air flow (Tr. 363).

190. The results of other air samples were not actionable (Tr. 370). Mr. Thurmond did not recall seeing one sample result, indicating where asbestos removal was performed, nor did he recall seeing the work in progress (Tr. 370-71).

191. Mr. Thurmond did not see conditions where fibers or dust were visible in the air on either March 24 or March 25 of 1990 (Tr. 338). If Mr. Thurmond detected dust in the air, he would have an air sample pulled to determine if the fibers were asbestos (Tr. 339).

192. Mr. Thurmond routinely makes two visual inspections daily of the work area (Tr. 337). Mr. Thurmond testified that he was actively involved in supervising asbestos removal approximately 8 hours out of each 12-hour shift (Tr. 337). Mr. Thurmond estimated he referred to air samples taken at the plant approximately 2 or 3 times a day (Tr. 360).

193. The equipment used to test for asbestos particles was not inadequate, according to Mr. Thurmond (Tr. 352). The air filter used in the pump was that required by NIOSH (Tr. 352).

194. According to Mr. Thurmond, there was no asbestos abatement work in Complainant's particular work area or in his ventilation area on either March 23, 24 or 25 of 1990 (Tr. 357-59). There was asbestos removal taking place in some other location on March 23, 1990 (Tr. 357). The asbestos removal being performed on March 23, 1990, was on a different floor, on the piping systems (Tr. 365).

195. Cassettes, containing filters from the air pumps, were taken to the laboratory for the initial screening of dust or fibers (Tr. 359-60).

196. Mr. Thurmond was also responsible for checking areas for cleanliness (Tr. 339). The pulling of dry tubes would not have been reported to Mr. Thurmond (Tr. 354).

197. Mr. Thurmond was not responsible for mists which were created by spraying the tubes, as that was a radiological concern (Tr. 365).

g. Mr. Zavadoski's testimony

198. On the evening of March 25, 1990, Mr. Zavadoski looked down into the condenser bay area and did not observe "anything unreasonable" in terms of dust (Tr. 387). He continued to monitor that area approximately every two hours (Tr. 395). He continued to monitor the work area because falsifications and other problems (Tr. 395). Some HPs from Georgia Power, and ARC, were involved in the walkoff (Tr. 396). Mr. Zavadoski testified that he did not find any discrepancies in the records (Tr. 396).

199. Mr. Zavadoski testified that dust masks are not approved as respirators for two reasons: first, the dust masks do not stop enough of the potential contamination; and second, they are not specifically designed to fit workers' faces (Tr. 386). If Mr. Zavadoski had seen a worker wearing a dust mask, he would have had that worker pulled from the area and tested for contamination (Tr. 388). Mr. Zavadoski testified that his workers have been instructed to do the same (Tr. 389).

200. Mr Zavadoski was aware of the federal regulation which governs the use of respirators, and prohibits unapproved respirators (Tr. 385).

201. Every worker at the Plant is given a body count upon employment to detect any possible previous radioactivity (Tr. 390). After reviewing Complainant's initial, and final, body counts, Mr. Zavadoski stated the results showed no measurable contamination (Tr. 391).

202. According to Mr. Zavadoski, all workers are given an exit body count (Tr. 392). Mr. Zavadoski testified that he had reviewed all of the body counts of the workers who worked on RWP 1527, and further testified that none of these workers had any internal contamination (Tr. 393). Mr. Jankovich testified, however, that he did not have an exit body count when he left the Plant (Tr. 402). Mr. Jankovich was aware that it is common for all employees to have such exit counts (Tr. 404). Mr. Jankovich was not concerned that he had been contaminated (Tr. 404).

[ENDNOTES]

[1] Citations to the record are made with the following abbreviations:

Tr. - Transcript Page
Cx - Complainant's exhibit
Rx - Respondent's exhibit
ALJ - Administrative file documents

Due to a numbering error at the hearing, there is no exhibit labelled ALJ-7. However, all ALJ exhibits are within the administrative file. At the hearing, Respondent's counsel

indicated he might distribute copies of certain air sample results. These copies were to have been labelled Rx-20. However, a copy of these materials was never received by this Office, and thus there is no exhibit labelled Rx-20. See Tr. 372-76.

[2]Complainant's pictures, offered as exhibits, were taken by someone Complainant chose not to identify (Tr. 42-44). Complainant was not certain on what date the pictures were taken, except that they were taken after his termination, probably between March 25 and March 30 of 1990 (Tr. 42-43). Complainant did not himself photograph any of the pictures offered into evidence, but he did identify them as representing the various boxes (Tr. 68-69). Complainant stated that the condenser pictured in his exhibits is the condenser at which he worked, as the other condenser in the plant was in operation at the time the pictures were taken (Tr. 81). Complainant stated he could hear the other condenser running while he was working at his condenser pulling tubes (Tr. 81).

[3]The Ninth and Tenth Circuits have held that the Energy Reorganization Act employee protection provision is applicable to employees who file internal safety complaints. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984); *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985). The Second Circuit has not directly ruled upon the issue, but has issued a decision in a matter which involved an internal safety complaint. *See Consolidated Edison Co. of New York, Inc. v. Donovan*, 673 F.2d 61 (2nd Cir. 1982). Only the Fifth Circuit has held that internal safety complaints are not covered under the Energy Reorganization Act whistleblower provision. *Brown & Root v. Donovan*, 747 F.2d 1029 (5th Cir. 1984). As the present case arises in the Eleventh Circuit (which has not yet ruled upon the issue), and as the Fifth Circuit's decision on the issue came after September 30, 1981, the Fifth Circuit's holding in *Brown & Root* is not binding. *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981). Therefore, the Secretary's decision in *Pensyl* is applicable to the present case.

[4]It is appropriate here to note a problem with much of Complainant's testimony and his witness's testimony. Hearsay evidence is an out-of-court statement, other than a statement made by the declarant while testifying, which is offered in evidence to prove the truth of the matter asserted. *See* 29 C.F.R. §18.801; Federal Rule of Evidence Rule 801. Although the Department of Labor's rules of evidence were not specifically applicable to this proceeding, as the investigation which preceded the present hearing did not commence thirty days after publication of the rules of evidence, these rules do indicate the problem with giving hearsay evidence probative weight. See 29 C.F.R. §18.1104. Therefore, where such testimony is given to prove the truth of the matter asserted, I have found such evidence insufficient to prove the matter asserted. However, where, as here, Complainant states that he heard a particular statement but does not offer it to prove the truth of the matter asserted, but rather to prove his state of mind and the reasonableness of his belief that there were unsafe and unhealthful working conditions, the hearsay prohibition is not applicable. In such situations, I find that the credibility of such statements, to indicate the reasonableness of Complainant's beliefs, is sufficient.

[5]Respondent did not submit the test results which Mr. Thurmond relied upon in determining that there was no asbestos dust problem (F-184). However, as I find Mr.

Thurmond's explanation of his inspection of the test results and work area sufficient, the fact that the air samples submitted into evidence were taken after Mr. Thurmond had talked to Complainant does not indicate that the previous test results were not truly reported.

[6]Complainant's witness, Mr. Jankovich, testified that the proper way to visually check for asbestos dust is to shield one's eyes with a hand while looking upward. Although neither Mr. South nor Mr. Thurmond reported inspecting in that manner, Mr. Thurmond's reference to air sample records properly tested the air for such dust. Furthermore, I find that Mr. Jankovich is not as qualified as Mr. Thurmond, who has worked with that issue for at least eight years (F-10). Mr. Jankovich's testimony concerning the alleged inadequacies in asbestos air testing equipment is likewise not credited, as Mr. Thurmond testified that the equipment was reliable and met regulatory requirements. Although I believed Mr. Jankovich when he testified that asbestos was a taboo subject at the plant, this does not prove that there were problems with asbestos detection at the time at issue in the present case. Finally, Respondent sought to have Mr. Zavadoski's testimony accepted as that of an expert witness (Tr. 379-80). As Complainant was not put on notice of Respondent's intent to call an expert witness, such categorization is inappropriate. In any event, Mr. Zavadoski's testimony is not given much weight since it does not relate to the events which transpired on the day Complainant was terminated. Although not as an expert, Mr. Zavadoski's testimony concerning the propriety of wearing dust masks does lend credence to Respondent's other witnesses' testimony.

[7]In pertinent part, under Category II of types of violations (which includes "[r]efusal to accept work assignments"), this rule provided as follows:

> First Violation
> Employee will be terminated for one month at Georgia Power Plants. Eligible for rehire after one month if the project requests additional craftsmen and the employee is referred to the project through the respective referral procedures of an employee's union.

See Rx-18, p. 2.

[8]Respondent raised several motions to dismiss during the proceedings (Tr. 21, 110, 325). These motions were taken under advisement and overruled (Tr. 21, 110-111, 326). Respondent has argued that once Complainant appeared satisfied with the explanation that there was no contaminated dust or particles, his concerns about dust which irritated his breathing condition were outside the scope of the Energy Reorganization Act. Respondent has cited no authority directly on this issue. As the purpose of the Energy Reorganization Act is to encourage employees of nuclear facilities to report safety concerns, a distinction between radioactively contaminated dust and other dust would tend to hinder such employee reports. The Secretary of Labor has indicated a very broad range of activities which are considered "protected" under this statute. Therefore, I find that, under the facts of this case, Complainant's concerns were within the protection of the Energy Reorganization Act. Further, it should not be implied from this finding that

Respondent was in fact not in violation of any safety rules concerning dust or specifically asbestos dust in the workplace. The present issues include whether Respondent adequately investigated and explained the condition of the work area for purposes of this Act or whether Respondent unlawfully discriminated against Complainant for voicing safety concerns, not whether Respondent acted appropriately within the constraints of another act or whether the work area was in fact safe.